IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

Case No. 00-12689
Chapter 7

RAYMOND EFFON DURHAM
TAMERA FAYE DURHAM

Debtors

C. KENNETH STILL, TRUSTEE and
BILLY D. GREEN

Plaintiffs

v.

Adversary Proceeding
No. 00-1189

RAYMOND EFFON DURHAM
TAMERA FAYE DURHAM

Defendants

MEMORANDUM AND ORDER

Appearances:

Jerry Farinash, Kennedy, Koontz & Farinash, Chattanooga, Tennessee, Attorneys for C. Kenneth Still, Trustee

Harold L. North, Jr., Shumacker & Thompson, Chattanooga, Tennessee, Attorneys for Billy D. Green

Gregory M. O'Neal, Winchester, Tennessee, Attorney for Defendants

HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the plaintiffs' Motion to Compel Discovery, For Sanctions and to Extend Discovery Deadline. The court has determined that a hearing on the issues is not necessary. For the reasons hereinafter set forth, the deposition of Attorney David Fulton shall be resumed in accordance with this Memorandum Opinion.

The bankruptcy trustee and a creditor, Mr. Green, have filed a complaint objecting to the discharge of both debtors, Ray and Tamera Durham. The complaint relies on Bankruptcy Code § 727(a)(2) & (3). 11 U.S.C. § 727(a)(2), (3). The objections are based partly on the failure of the debtors to list various assets and transfers in their original schedules.

When the debtors filed their bankruptcy petition, they were represented by attorney David Fulton. They have since changed attorneys and now are represented by Greg O'Neal. One of the plaintiffs, Mr. Green, attempted to take Mr. Fulton's deposition but got nowhere because he claimed the attorney client privilege. The question now before the court is whether to require Mr. Fulton to answer because the privilege does not apply or has been waived. The debtors' earlier Rule 2004 examinations are relevant to waiver. A summary of their testimony follows after some background information that will explain some of the questioning.

One of the debtors, Ray Durham, had a concrete finishing business known as Durco. Durco used and may have owned some equipment. Some of the equipment was sold or repossessed within a year or two before bankruptcy.

The debtors also sold some real property, known as the Goose Pond property, not long before the bankruptcy. They received about $45,000 in equity and split it evenly between them. The trustee alleges failure to account for this. Mrs. Durham turned over about $19,000 to the trustee. Mr. Durham paid $15,000 down on another house, the Woodbury Highway house. In Mr. Durham's deposition, the testimony regarding a house relates primarily to this house and the failure to list it in the original schedules.

Summary of Tamera Durham's earlier testimony

She had little conversation with David Fulton. Most of her communication was through her husband, Ray Durham. She thought she just had to list debts. She was asked to list them and did, but then Mr. Durham told her they had to list assets, and so they worked on the amended schedules. She first saw attorney Fulton when the original papers were signed. She had never talked to him about filing until then. Mr. Durham told her that attorney Fulton advised bankruptcy. She talked to Terri in Mr. Fulton's office about listing debts. She listed them, but not on a form. About two or three days before the meeting of creditors with Mr. Still, the bankruptcy trustee, she told Mr. Fulton she had money and wanted to turn it in. She had no conversation with Mr. Fulton about dismissal of case; she only talked to her husband. Mr. Durham told her that Mr. Fulton said they should not have filed, and it had something to do with Mr. Green's state court case. She talked to Mr. Fulton about an amendment to her schedules. Mr. Fulton told her to put "yard sale" value of furniture on the schedules. Mr. Fulton went over the amended schedules item by item.

Summary of Ray Durham's earlier testimony

He went to attorney Fulton to talk about divorce, and Mr. Fulton said it looked like he needed bankruptcy. He felt like he was more or less talked into it. He hadn't planned on taking bankruptcy.

He filled out papers in Mr. Fulton's office to start bankruptcy. They asked him some questions, but none were explained. He doesn't remember paperwork for him to fill in, nor was he given anything to take home.

As to the amendments to the schedules, things were not explained [by Mr. Fulton]. As to the house on Woodbury Highway, Mr. Fulton told him he was allowed to buy a house. This was just a misunderstanding, and a lawyer not being clear. He didn't think the house had to be listed at all because Mr. Fulton told him he could keep it. Mr. Fulton finally told him and his wife they had to or should have disclosed it. Mr. Fulton told them that they were allowed to keep a house, allowed to keep a car, allowed to keep this. That's the way they took it really.

He told Mr. Fulton that he had the house on Woodbury Highway to begin with. When asked if Mr. Fulton told him he did not have to list the house, Mr. Durham said, "As far as I know, he told me, yeah." Mr. Durham did not remember how it was brought up that they had to reveal it.

It was probably Mrs. Durham who told Mr. Fulton about the cash from the sale of the Goose Pond property. It was not on the original schedules as the result of Mr. Fulton not explaining something thoroughly enough for a dumb, uneducated person to understand.

Mr. Fulton said they couldn't have done anything about it if he had bought a house with the cash.

He paid Mr. Powers $15,000 down on the house on Woodbury Highway. He paid Mr. Powers a cash down payment and got a receipt. Mr. Fulton has the receipt. Mr. Fulton knew about the Woodbury Highway property. He told Mr. Fulton about the house, and Mr. Fulton has the receipt showing the $15,000 down payment. As far as he knows, Mr. Fulton had that information when he first filed bankruptcy.

In the same period, he paid lawyers' fees of $3,000 to $4,000 to Mr. Fulton and $3,000 to $4,000 to Marvin Berke.

He does not remember if Mr. Fulton told him to leave the 1987 dump truck off the schedules. Leaving it off may have been a misunderstanding about whether it was in the company [Durco].

He guesses that he and Mrs. Durham figured out the original schedules were wrong by the lawyer telling us here's what we need to do. He thinks Mr. Fulton brought up some of the stuff — what was in the company and what wasn't — but he does not remember for sure.

Maybe it was his, Mr. Durham's, misunderstanding. Mr. Fulton said you're allowed to keep a house, you're allowed to keep this and not allowed to keep that. He told different things you're allowed. You're allowed so much furniture.

He does not remember who brought up bankruptcy. It was not likely he went in for divorce and bankruptcy.

He sat down and went over the schedules with Mr. Fulton at one time. Mrs. Durham was not there; she talked to Terri and gave her information. He indicated from day one he wasn't really in thought of taking bankruptcy.

He does not remember what happened to change his mind and make him ask for dismissal of the bankruptcy case. He does not remember what changed his mind. He does not remember that Mr. Fulton told the trustee he wanted it dismissed. He does not remember that he wanted it dismissed

He signed the bankruptcy papers, he guessed, because he felt it was the only way out.

He does not remember if he or Mrs. Durham or Mr. Fulton brought up going back and listing assets. Mr. Fulton put down what the household goods were worth. He did not tell Mr. Fulton. Mr. Fulton put down the value of Durco. Neither he nor Mrs. Durham told Mr. Fulton the value to put down.

He glanced over the papers originally signed. He does not remember if Mr. Fulton was there.

He and Mrs. Durham did not live in Chattanooga, but they filed here because Mr. Fulton wanted it here.

DISCUSSION

Bankruptcy Rule 9017 makes the Federal Rules of Evidence apply in bankruptcy proceedings. Rule 501 of the Federal Rules of Evidence establishes a general rule that the privilege of a witness is governed by federal common law. *Fed. R. Bankr. P.* 9017; *Fed. R. Evid.* 501. The major exception applies in civil actions when state law supplies the rule of decision on an element of a claim of defense; then, the witness's privilege is governed by state law. In their brief the debtors assert that the privilege is determined by state law in this proceeding. Clearly it is not. The issues of discharge and dischargeability are governed by federal, bankruptcy law. *French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N. D. Ohio 2000) (complaint to revoke discharge).

The attorney client privilege is the client's privilege to assert and to waive. The attorney may assert the privilege on behalf of the client, but the attorney does not have the privilege. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 201at 389-390 (2nd ed. 1994). Of course, the attorney has an ethical obligation not to reveal privileged

information, and to avoid revealing such information, the lawyer may assert the privilege on behalf to the client.

Waiver or No Privilege

It has been held that there is no privilege with regard to information the debtor provided to his attorney for the purpose of completing the bankruptcy schedules. The court reasoned that the debtor does not expect the information to remain confidential; the debtor expects the information to be used for the schedules that will be filed and will become a public record. *In re French*, 162 B.R. 541 (Bankr. D. S. D. 1994); *see also United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992). As a result, the client and the attorney can be required to testify as to what information the client gave to the lawyer to be included in the schedules.

Another court has held, however, that not all information provided in an intake interview is outside the privilege. *In re Stoutamire*, 201 B.R. 592 (Bankr. S. D. Ga. 1996)[1], the court said:

> After careful consideration, this Court finds that the communications . . . go beyond the mere revealing of information which would ultimately end up as a public disclosure. The information sought here deals with the conversations and communications between the lawyer and client with respect to the intake interview questions. While the responses elicited from that questionnaire will be used to prepare the schedules, all of the information contained therein may or may not ultimately be

[1]For some reason, the court applied Georgia law even though the issue was whether to dismiss a Chapter 13 case for failure to disclose a personal injury settlement.

> disclosed publicly in such schedules. The legal decision regarding whether or not certain information obtained in the intake interview should be included in the schedules and the conversations that occurred in gathering the information are necessarily protected. Accordingly, this Court concludes that the attorney-client privilege has been properly asserted.

201 B.R. 592, 596.

The trustee really was not seeking to find out what information the debtor provided to the lawyer for inclusion in the schedules. The trustee wanted to know (1) whether the questionnaire used by the debtor's lawyer should have resulted in the debtor's disclosure of the personal injury claim, and (2) whether questions or explanations given in the process should have resulted in the debtor's disclosure of the claim.

The court did not mention implied waiver. Implied waiver should have applied because the debtor raised as a defense the failure of the attorney to ask any question that should have resulted in disclosure of the personal injury claim. The debtor should not have been able to defend on the ground that the attorney did not ask for the information and then use the privilege to block the other side from finding out what the attorney asked. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 203 (2nd ed. 1994).

The alternative holding in the *French* case was that the debtor had waived the privilege. Judge Ecker held that the debtor waived the privilege by stating in a Rule 2004 examination that he had told the attorney's assistant about certain bank accounts even though the schedules listed none. The privilege did not shield the legal assistant or the attorney from testifying as to whether the information was in fact provided. This is direct instead of implied waiver as explained below.

Waiver generally

There are two possible types of waiver. The first and more common type of waiver occurs when the client voluntarily discloses information that is subject to the privilege. For example, when the witness has already testified that he told his lawyer something, the witness can no longer claim that the communication to the lawyer is protected by the privilege.

Can the lawyer still claim the privilege if asked whether the client told him or when the client told him or if the client told him exactly what the client claims to have told him? No. The client has already revealed the communication to the lawyer. Suppose the client testifies to what the lawyer told him or did not tell him. The same reasoning applies. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 201 (2nd ed. 1994).

Implied waiver occurs when the client makes his communication to the lawyer or the lawyer's communication to him an element of a claim or defense. For example, the client may attempt to prove no intent to violate the law because his lawyer advised him the transaction was legal. The other party must be able to find out what the client told the lawyer and what the lawyer told the client with regard to the transaction. What information did the client have, what information did he give to the lawyer, what was the lawyer's advice? Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 203 (2nd ed. 1994).

Certainly, Mr. Durham's testimony in the Rule 2004 examination waived the privilege regarding the scheduling of the house on Woodbury Highway. He repeatedly testified that it was revealed to his attorney before the original schedules were filed. He also

testified that he may have misunderstood the attorney's explanations as to what he was required to reveal.

The same reasoning applies to the cash from the sale of the Goose Pond property and to the 1987 dump truck. Mr. Durham has waived the privilege as to when and how his attorney learned about the cash and the dump truck.

The Rule 2004 examination included numerous questions about other property and transfers, but the questions were aimed at determining what happened to the property and when; they did not specifically address when Mr. Durham revealed them to his attorney or why he did not reveal them in the original schedules. As to this property, there has been no waiver on the theory that Mr. Durham has already testified to the communications between him and Mr. Fulton. Mr. Durham did not testify as to what he told his lawyer and what his lawyer said to him regarding this other property.

As to the house on Woodbury Highway, the facts support an implied waiver also. Mr. Durham asserts that he may have misunderstood what his attorney told him with regard to listing the house. This puts into issue what his attorney told him. Mr. Durham cannot rely on an alleged misunderstanding of his attorney's instructions and then use the privilege to prevent the plaintiffs from finding out the explanations given by the attorney or his staff.

This reasoning supports a broader implied waiver as to why other property or transfers were not listed. As to the numerous amendments to the schedules, Mr. Durham also relied on misunderstanding his attorney as to what he needed to reveal. Certainly, the

attorney's directions to the debtor are put in issue as an excuse for not originally including the information. The debtor cannot make a defense based on misunderstanding his attorney's instructions and then use the privilege to prevent the plaintiffs from discovering the explanations or instructions given by the attorney or his staff as to the information that should be revealed. *Aetna Insurance Co. v. Nazarian (In re Nazarian)*, 18 B.R. 143 (Bankr. D. Md. 1982) (Debtor waived privilege by asserting advice of counsel as reason for omitting transfers from schedules.)

The decisions to file bankruptcy and to seek dismissal

In the Rule 2004 examinations, the plaintiffs were very interested in whether Mr. Fulton convinced the debtors to file or they brought up the subject. The discussions on whether to file may not be relevant to the complaint, but that is not a question regarding the privilege.

As to the privilege, Mr. Durham's testimony at the Rule 2004 examination may have partially waived the privilege regarding communications on this subject. He testified that he didn't go to see Mr. Fulton with the intention of filing bankruptcy, he thought Mr. Fulton brought up the subject, and he was more or less talked into it. At the least, this allows testimony as to who brought up the subject of bankruptcy and whether the debtors wanted to file or were convinced to file by Mr. Fulton. It might not waive the privilege as to communications involving the wisdom of filing in light of the debtors' circumstances, including debts, property ownership, transfers, and pending lawsuits. Neither debtor testified to any discussions with Mr. Fulton on those points.

Likewise, there may be no implied waiver as to any communications regarding the decision to file bankruptcy. The question is whether the plaintiffs should be allowed to discover communications between the debtors and their lawyer regarding whether the debtors wanted to file. There would be an implied waiver if the debtors are relying on their reluctance to file as part of their defense – as part of their excuse for failing to schedule property and transfers. Reluctance to file makes more sense as a motive for hiding assets and transfers than as a reason for lack of care or mistake. This suggests the debtors are not relying on reluctance to file as an excuse for the inaccurate schedules. If this is correct, there is no implied waiver that allows the plaintiffs to discover discussions with the attorney on the wisdom of filing.

The plaintiffs were also very interested in why and how the debtors reached the conclusion to seek dismissal of the case. The same problems apply to this line of questioning as to questions about the decision to file bankruptcy. At the Rule 2004 examinations, neither debtor testified to what he or she said to Mr. Fulton or what Mr. Fulton said to him or her regarding the reasons for seeking dismissal. At least this is true unless you count Mrs. Durham's hearsay testimony that Mr. Durham told her the need to dismiss had something to do with Mr. Green's lawsuit not being completed. Since Mrs. Durham was not recounting anything that Mr. Fulton said to her, this statement did not waive the privilege. Likewise, there may be no implied waiver because the debtors apparently are not asserting the desire to dismiss as an element of their defense. Indeed, the desire to dismiss after they found out the original schedules were wrong does not make much sense as an excuse for the inaccurate schedules. It makes more sense as an indicator of attempted fraud by the debtors when they filed the original schedules.

Nevertheless, the discussions regarding the decision to file and the reasons for seeking dismissal may be discoverable under the crime-fraud exception to the attorney client privilege.

The Crime-Fraud Exception

The plaintiffs also rely on the crime-fraud exception to the attorney client privilege. The crime-fraud exception prevents the privilege from applying to communications between the attorney and client when the client is using or attempting to use the attorney's services in the commission of a current or future crime or fraud. A two part test determines whether the exception applies. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 195 (2nd ed. 1994).

First, the party asserting the exception must make a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the attorney's advice, or the client was planning criminal or fraudulent conduct when he sought the attorney's advice, or the client planned to commit a crime or fraud after receiving the attorney's advice.

Second, the party asserting the exception must show that the client obtained the attorney's assistance in furtherance of the crime or fraud or that the attorney's assistance was closely related to it. The Sixth Circuit states this requirement differently. It requires proof of a relationship between the communication at issue and the prima facie fraud or crime. *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997).

A bankruptcy case dealing with the exception is *French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N. D. Ohio 2000). The bankruptcy trustee sought to revoke the debtors' discharge for failure to reveal a personal injury claim and for failure to turnover the proceeds that were received during the bankruptcy case. As prima facie evidence of fraud, the trustee asserted the debtors' failure to turnover the proceeds and failure to schedule all their creditors. The debtors asserted lack of fraudulent intent. The court held the trustee's evidence was enough for a prima facie showing that the debtors engaged in fraud in the bankruptcy case while represented by their bankruptcy attorney. The court held, however, that the trustee did not present enough evidence to meet the second requirement. The evidence did not show a relationship between the alleged fraud and the debtors' communications to their attorney. The court said that it could not find a relationship without knowing what communications would be revealed. The court held that it would conduct an *in camera* review to determine if a relationship existed. To justify an *in camera* review, the party asserting the exception need only show "a factual basis adequate to support a good faith belief by a reasonable person that an in camera review of the materials may reveal evidence to establish

the claim that the crime-fraud exception applies." *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 2631, 105 L.Ed.2d 469 (1989).

The crime-fraud exception does not require that the client be successful in the attempted crime or fraud. *United States v. Collis*, 128 F.3d 313 (6th Cir. 1997). The attorney need not know that the client is attempting a crime or fraud. The client's intent controls in determining whether the exception applies. *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996). Furthermore, the exception applies if it is the client's general purpose to commit a crime or fraud. The client's lack of criminal or fraudulent intent with regard to a particular communication does not prevent the exception from applying.

The facts in this case support applying the crime-fraud exception. There is prima facie evidence of an attempted fraud in the debtors' original failure to reveal assets and transfers. Mr. Durham's testimony at the Rule 2004 examination shows a relationship between the prima facie violation and his communications with his lawyer, Mr. Fulton.

In this regard, consider Mr. Durham's assertion that he was reluctant to file but was talked into it by Mr. Fulton. Reluctance to file seems to cut both ways. It can be a reason for fraud by the debtors, for trying to hide assets and transfers. The theory is that since the debtors did not want to file, they would try to avoid the full effects of the bankruptcy. But there is a counter theory: since the debtors did not especially want to file, they were not especially concerned with the effects of the bankruptcy and would not have gone to the trouble of trying to mislead the trustee or their creditors. Though reluctance to file could provide a motive for fraud by the debtors, it may be to their benefit to get in all the facts, including Mr. Fulton's recollection. Certainly the crime-fraud exception should apply because

reluctance to file reflects on the debtors' intent with regard to the prima facie appearance of attempted fraud.

The same reasoning applies with regard to the reasons for seeking dismissal after the debtors were required to correct the erroneous schedules. The crime-fraud exception should apply to communications between them and their lawyer on this subject.

Express waiver and the work product doctrine

During Mr. Durham's Rule 2004 examination, he was asked if he would allow the plaintiffs to copy Mr. Fulton's file. He said he didn't care. This might be taken as an express waiver of the privilege as to any parts of the file that are protected by the privilege. The plaintiffs' brief does not expressly make this argument. The problem may be that the debtors' new attorney has asserted the work product doctrine on their behalf. Furthermore, Mr. Fulton can assert the work product doctrine. Though the attorney-client privilege is the client's privilege, the attorney has the independent right to protect information under the work product doctrine. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 204 (2nd ed. 1994).

The work-product doctrine is also broader than the attorney-client privilege in other ways; it protects materials not based on confidential communications and materials prepared by non-lawyers for a party or a lawyer in preparation for litigation. The plaintiffs' motion seeks the file for copying, but the evidence at this time does not allow the court to decide what parts of the file, if any, are not protected by the privilege or the work-product doctrine. Therefore, the court makes no ruling at this time on copying of Mr. Fulton's file. The

court reserves that problem for further development if the parties desire it. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 204 (2nd ed. 1994).

Disclosure and an attorney's ethical duties

An attorney has an ethical duty to keep communications with a client confidential. This duty is separate from the attorney client privilege, but when a court decides that the privilege does not apply or has been waived, the attorney can testify without violating his ethical obligations. *Tenn. S. Ct. R.* 8; Disciplinary Rule 4-101(c)(2); *United States v. Evans*, 954 F.Supp. 165 (N. D. Ill. 1997); *In re Duque*, 134 B.R. 679, 688 (S. D. Fla. 1991). Mr. Fulton's ethical duty to keep confidential his communications with Mr. or Mrs. Durham is not a barrier to his testimony to the extent the court has decided that the privilege has been waived. Accordingly,

It is ORDERED the deposition of attorney, David Fulton, is allowed to proceed in accordance with the rulings made in this memorandum and order;

It is FURTHER ORDERED that the court reserves ruling on the motion to compel production;

It is FURTHER ORDERED that the court reserves ruling on the motion for sanctions until trial or other final disposition of this adversary proceeding; and

It is FURTHER ORDERED that the discovery deadline is extended until July 6, 2001.

ENTER:

BY THE COURT

_____
R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 5-11-01]